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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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**No. 79-770**

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ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

NATIONAL CRUSHED STONE ASSOCIATION, *et al.*,  
*Respondents.*

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DOUGLAS M. COSTLE,  
*Administrator*

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

CONSOLIDATION COAL COMPANY, *et al.*,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

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**BRIEF FOR NATURAL RESOURCES DEFENSE  
COUNCIL, INC., *AMICUS CURIAE***

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**INTERESTS OF THE NATURAL RESOURCES  
DEFENSE COUNCIL**

The Natural Resources Defense Council, Inc., ("NRDC")  
is a national environmental organization with more than 44,000

members residing in all states and territories, as well as abroad. For nearly ten years, one of NRDC's primary objectives has been to protect the integrity of our Nation's waters from polluting activities. Toward this end, NRDC has worked to bring about effective implementation of the Clean Water Act ("the Act") and its predecessor, the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §§ 1251, *et seq.*

At stake here is one of the Act's most important principles. In *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), this Court confirmed that Congress authorized the Administrator of the Environmental Protection Agency ("EPA" or "the Agency") to regulate industrial pollutant discharges from existing sources through the issuance of nationally uniform effluent limitations under Sections 301(b)(1)(A) and 304(b)(1) of the Act, as long as those limitations are applied with sufficient flexibility. *Id.* at 128. The decisions below represent a major excursion from that principle. The Fourth Circuit has required the Administrator to re-examine uniform limitations each time a discharger asserts a claim of economic hardship, and to consider relaxing the regulations on a case-by-case basis wherever the Agency is unable to counter those assertions with its own analyses.

NRDC has a long-standing interest in this issue. Believing that the first step toward industrial pollution control must be prompt issuance of effluent limitations, NRDC has participated extensively in litigation to enforce the Act's deadlines for promulgating these regulations. For example, NRDC brought suit when EPA missed the Act's deadline for issuing the first set of effluent limitations. In *NRDC v. Train*, 6 ERC 1033 (D.D.C. 1973), *aff'd in part and rev'd in part*, 510 F.2d 692 (D.C. Cir. 1975), the District Court established a schedule for promulgating limitations reflecting the "best practicable control technology currently available" (BPT) as required by Sections 301(b)(1)(A) and 304(b)(1) of the Act. The regulations at

issue here descended from that case.<sup>1</sup> In 1973-75, NRDC brought a series of lawsuits to remedy the Agency's failure to promulgate pretreatment standards and other controls on toxic pollutants. As a result, EPA is developing limitations reflecting the "best available technology economically achievable" (BAT)<sup>2</sup> and other standards for 21 major industrial categories under the requirements of the consent decree in *NRDC v. Train*, 8 ERC 2120 (D.D.C. 1976), *rev'd in part*, *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), *modified*, *NRDC v. Costle*, 12 ERC 1833 (D.D.C. 1979). NRDC believes that the Court's decision in this case could affect the integrity and validity of those regulations as well.<sup>3</sup>

NRDC has long been interested in the *manner* in which effluent limitations are developed and applied to individual

<sup>1</sup> See *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 112 n.4 (4th Cir. 1979).

<sup>2</sup> 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2). The government's brief explains why there are different compliance deadlines for the various species of BAT, and refers to these limitations collectively as the "1987 limitations." Brief for the Petitioners, note 6. As a result of the consent decree described in the text, however, nearly all of the Agency's BAT limitations will pertain to toxic pollutants, for which the statutory compliance date is July 1, 1984. Accordingly, NRDC will use "1984" in referring to BAT limitations.

<sup>3</sup> This case involves only the proper scope of EPA's variance provision pertaining to BPT. However, EPA also has promulgated variance provisions—not specifically authorized by Congress—pertaining to BAT as well as pretreatment standards required under Section 307(b) of the Act. 40 C.F.R. § 125, 44 Fed. Reg. 32948 (June 7, 1979). The validity and proper scope of these provisions is the subject of other, pending litigation. *NRDC v. EPA*, No. 79-1618 (D.C. Cir. filed June 14, 1979); *Virginia Electric Power Co. v. EPA*, No. 79-1347 (4th Cir. filed June 14, 1979); *American Petroleum Institute v. EPA*, No. 79-2433 (5th Cir. filed June 14, 1979). NRDC believes that the Court's disposition of this case could shed light on these ancillary, yet important issues.

dischargers through the Act's permit system.<sup>4</sup> In *NRDC v. EPA*, 537 F.2d 642 (2d Cir. 1976), NRDC unsuccessfully contended that, in view of the Act's demand for uniformity, no variances should be allowed from BPT limitations. NRDC also filed *amicus curiae* briefs in the many other appellate cases which dealt with the Administrator's authority to issue uniform effluent limitations, as well as the related question of EPA's duty to provide variances from those limitations.<sup>5</sup> And NRDC participated as *amicus curiae* in *duPont v. Train*, wherein we urged the Court to uphold EPA's authority to issue uniform BPT regulations. The Court approved that authority on condition that EPA exercise some administrative flexibility in implementing the regulations. 430 U.S. at 128.

Moreover, in a case recently decided by the Fourth Circuit, NRDC raised precisely the issue presented by the government's petition to this Court: whether EPA's BPT variance provision must include consideration of a discharger's "economic capability," i.e., its ability to afford the costs of installing and

<sup>4</sup> The effluent limitations established pursuant to Section 301 are applied to individual dischargers by means of the permit system established under Section 402 of the Act, 33 U.S.C. § 1342, and designated the National Pollutant Discharge Elimination System ("NPDES"). Under NPDES, the Administrator, or a State official pursuant to a federally approved state program, may issue permits for discharges of pollutants on condition that the discharges will meet all applicable requirements of the Act, including those under Sections 301, 302, 304, and 307. *Id.*

<sup>5</sup> *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *E. I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1976) and 541 F.2d 1018 (4th Cir. 1976); *Tanner's Council of America Inc. v. Train*, 541 F.2d 1188 (4th Cir. 1976); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976); *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976); *American Frozen Food Institute v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *American Paper Institute v. Train*, 543 F.2d 328 (D.C. Cir. 1976); *American Petroleum Institute v. Train* 526 F.2d 1343 (10th Cir. 1975) and 540 F.2d 1023 (10th Cir. 1976).

operating BPT. *Appalachian Power Company v. Train*, Nos. 74-2096, *et al.* (4th Cir. April 28, 1980) ("*Appalachian Power* [1980]").<sup>6</sup> The case came before the court on petitions filed by NRDC and numerous power companies for review of the Administrator's actions on remand in *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976) ("*Appalachian Power* [1976]"). In *Appalachian Power* [1976], the court ordered EPA to expand the BPT variance by adding the factors specified in Section 301(c) of the Act. 545 F.2d at 1359-60. NRDC filed its petition in *Appalachian Power* [1980] to contest the Administrator's failure to consider events arising after the 1976 remand which, in our view, demonstrated the error in the Fourth Circuit's rationale. These events included this Court's decision in *duPont* and the D.C. Circuit's decision in *Weyerhaeuser Company v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). The Fourth Circuit denied NRDC's petition on several grounds.<sup>7</sup>

<sup>6</sup> The Fourth Circuit's opinion in *Appalachian Power* [1980] is set forth as an Appendix to this brief.

<sup>7</sup> NRDC intends to file a petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit on the basis of *Appalachian Power* [1980]. If it is granted, we intend to request that the case be reviewed together with the two cases now before the Court. We will urge the Court to consolidate these three cases for several reasons.

First, the Fourth Circuit rejected NRDC's position on the specific question presented here. We contended that *Appalachian Power* [1976] was no longer good law—in light of this Court's subsequent decision in *duPont* and the D.C. Circuit's decision in *Weyerhaeuser*—to the extent it required EPA to include Section 301(c) in the BPT variance. The court "declined to change [its] *Appalachian Power* variance holding." (App. at 12a). In so doing, the court implicitly rejected NRDC's argument, set forth at 28-32, *infra*, that the Act and *duPont* preclude consideration of Section 301(c) in BPT variance decisions. That argument was neither raised nor considered in the two cases before this Court.

Second, *Appalachian Power* [1980] presents an important issue of first impression that has significance for the administration of the Clean Water Act. NRDC contended that Section 301(1) of the Act,

(footnote continues)

Finally, NRDC and its members have a strong interest in the outcome of this case because we believe the decision below would seriously delay the progress toward clean water that Congress envisioned when it prescribed a uniform, technology forcing regulatory scheme. Congress has enacted precise, comprehensive legislation to require expeditious abatement of industrial pollution. Twice within a span of five years, Congress has considered amendments to the federal law of water pollution control, and each time has examined carefully the manner in which this progress is being achieved. As a result, the Act explicitly provides avenues for relief from many of its requirements and deadlines. But the Act contains no indication of Congressional intent to deviate from this Court's holding in *duPont* that uniform BPT limitations, with only limited variations, must serve as the foundation for industrial pollution abatement. The decisions below threaten to undermine that foundation—in terms of both the degree of pollution control required and the protracted permit proceedings that will be necessary—to the detriment of NRDC's members who enjoy and depend on the Nation's aquatic resources.

(footnote continued)

which prohibits any modification of effluent limitations that apply to toxic pollutants, narrows the circumstances in which EPA may grant BPT variances. The court held that Section 301(1) "does not apply to BPT variances." (App. at 14a).

Third, all three decisions affect the scope of EPA's uniform BPT variance clause even though each case pertains to only one industrial category. In the interests of judicial economy and efficient administration of the Clean Water Act, we believe the Court should resolve all pertinent issues, for all categories, in one decision.

Finally, *Appalachian Power* [1980] creates clear conflicts, both within the Fourth Circuit and between that circuit and the D.C. Court of Appeals. Contrary to *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 245 (4th Cir. 1979), and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1041-44 (D.C. Cir. 1978), the court indicated in *Appalachian Power* [1980] that it disapproved of EPA's position that "[r]eceiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." (App. at 11a-12a).

This *amicus* brief is filed with the consent of the parties to this case. Copies of the letters of consent are filed herewith.

## QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency is required, or even permitted, to consider the economic factor specified in Section 301(c) of the Clean Water Act, 33 U.S.C. § 1311(c), in deciding applications for variances from uniform BPT effluent limitations promulgated pursuant to Sections 301(b)(1)(A) and 304(b)(1) of the Act, 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1).

## STATEMENT OF THE CASE

### I. The Limits of the Question Presented.

The government's petition asks whether the BPT variance provision must provide for consideration of a discharger's economic capability—under Section 301(c) or otherwise. *Amicus* NRDC poses a question that in one aspect is somewhat narrower, since it asks only whether the economic factor specified in Section 301(c) need be considered in determining variances from BPT. We believe the broader question raised by the government is not properly before this Court because it was not decided below. See *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In both decisions below, the court remanded EPA's variance provision for compliance with *Appalachian Power* [1976]. See *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 124 (4th Cir. 1979); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 244 (4th Cir. 1979). That 1976 decision required EPA to include in its BPT variance clause the statutory factors set out in Sections 301(c) and 304(b)(1)(B) of the Act. 545 F.2d at 1359-60.

With respect to consideration of a particular discharger's economic capability, *Appalachian Power* [1976] relied entirely on the opinion that Section 301(c) must be applied to BPT as well as to BAT. After discussing the relevance of Section 301(c) to BAT limitations, the court stated: "[I]f such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards . . . ." 545 F.2d at 1359. Nothing in *Appalachian Power* [1976] or the two cases now before this Court suggests any alternative rationale for including economic hardship among the variance factors. Indeed, the lower court has recognized, without further comment, that EPA's variance clause now complies with *Appalachian Power* [1976] insofar as it requires consideration of the factors set forth in Section 304(b)(1)(B). *National Crushed Stone*, 601 F.2d at 123.

In contrast, the broad question framed by the government has been raised in two other cases. The D.C. Circuit has decided that the BPT variance provision need not include consideration of economic capability. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). The court held that while the Section 304(b)(1)(B) factors include a cost-effectiveness test, they do not require EPA to consider whether an individual discharger can afford the costs of BPT. *Id.* at 1035-36.

The second case raising the government's broad question is *Appalachian Power* [1980], discussed above. There, the parties briefed and argued this question before the Fourth Circuit for the first time. In particular, the briefs raised questions as to whether the term "practicable" in Section 301(b)(1)(A) and the concept of "total cost" in Section 304(b)(1)(B) imply a duty to consider economic hardship quite apart from Section 301(c). In its recent decision, the court did not address these issues.

Consequently, no question is properly before this Court except whether the factors specified in Section 301(c) should apply to BPT variances.

In another aspect, however, the question NRDC presents is broader than that raised by the government. The government asks only whether economic considerations are a *mandatory* component of the BPT variance provision. NRDC believes that a legitimate subsidiary question is whether the Administrator is even *permitted* to consider the economic factors, specified in Section 301(c), in deciding BPT variances. As discussed below,<sup>8</sup> we believe the Act and *duPont* preclude consideration of affordability in BPT variance decisions.

## II. The Context and Implications of the Case.<sup>9</sup>

This case calls upon the Court to interpret and apply the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.*, in light of its legislative history. The linchpin of this Act is its absolute prohibition against pollutant discharges that fail to meet certain minimum standards. 33 U.S.C. § 1311(a). For existing industrial point sources, those standards require progress toward the elimination of pollutant discharges in two distinct stages.

At the first stage, point sources were required to reduce their discharges by 1977 to a level which can be achieved through application of the "best practicable control technology currently available" (BPT). Clean Water Act § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). BPT limitations are in-

<sup>8</sup> See discussion at 28-32, *infra*.

<sup>9</sup> The government's statement describes adequately the procedural background of this case and the Court of Appeals' decision under review here. However, Amicus NRDC believes it is imperative that the Court appreciate the broader context in which this issue arises, as well as the differences in the reasoning employed by the courts which have addressed the issue, and the important practical implications of the decisions below. NRDC's statement summarizes these aspects of the case.

tended to bring all sources in an industrial category to a single baseline which represents, at a minimum, the "average of the best performers" in that category.<sup>10</sup>

At the second stage, the same sources must upgrade their pollution controls by 1984 to a level which can be achieved through application of the "best available technology economically achievable" (BAT). Clean Water Act, § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). BAT limitations must ensure "reasonable further progress [beyond the BPT stage] toward the national goal of eliminating the discharge of all pollutants." *Id.* In contrast to the BPT stage, BAT limitations must be pegged, at a minimum, to "the best performer" in any industrial category.<sup>11</sup> Indeed, BAT regulations "*shall require the elimination of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable . . .*" *Id.* (emphasis added).

The Administrator must consider specific statutory factors in developing BPT and BAT regulations. The factors pertaining to BPT are contained in Section 304(b)(1)(B) of the Act. The BAT factors are set forth in Section 304(b)(2)(B). To provide for increased pollution abatement from the first stage to the second, these sets of factors differ in one important respect. At the first stage, EPA must perform a cost-

<sup>10</sup> Remarks of Sen. Muskie explaining the Conference Report on the Federal Water Pollution Control Act Amendments of 1972. 1 *Leg. Hist.* 169-70. The Congressional Research Service of the Library of Congress has published a detailed, two-volume legislative history of the 1972 Act, titled A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong. 1st Sess., Serial No. 93-1 (Comm. Print 1973). Citations to this compilation of the legislative history will be: "*Leg. Hist.* —."

<sup>11</sup> 1 *Leg. Hist.* 169-70 (remarks of Sen. Muskie). Of course, if no discharger in a given category is utilizing the "best available" or "best practicable" technology for that category, the Administrator should establish effluent limitations with reference to technologies used in different industries or otherwise demonstrated to be reliable and effective. *Id.*

effectiveness analysis by considering the costs of BPT "in relation to" the effluent reductions that will be achieved. 33 U.S.C. § 1314(b)(1)(B). This is not a true cost-benefit analysis, since EPA need not consider the effect on the quality in a particular water body that is produced by any particular reduction of effluent discharges. *Weyerhaeuser*, 590 F.2d at 1041-44, 1047. At the second stage, the Act envisions much less emphasis on costs. EPA need only "take into account" the cost of achieving BAT. 33 U.S.C. § 1314(b)(2)(B); see *Weyerhaeuser*, 590 F.2d at 1045.<sup>12</sup>

The Act provides for limited variances from both BPT and BAT limitations. Section 301(c) permits the Administrator to modify BAT limitations if the applicant meets two conditions. He must show that less stringent requirements (1) "will represent the maximum use of technology within the economic capability" of that discharger, and (2) "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c).<sup>13</sup> While the Act is silent regarding variances from BPT, in *duPont* the Court held that at

<sup>12</sup> Senator Muskie explained the consideration of BAT costs as follows:

As to the cost of "best available" technology, the Conferees agreed upon the language of the Senate bill in Section 304(b)(2). While cost should be a factor in the Administrator's judgment, no balancing test will be required. The Administrator will be bound by a test of reasonableness. In this case, the reasonableness of what is "economically achievable" should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology—without regard to cost.

1 *Leg. Hist.* 170 (emphasis added).

<sup>13</sup> As a result of amendments enacted in 1977, the Act also contains a second variance from BAT limitations. Section 301(g)(1) directs the Administrator to modify BAT for certain pollutants if a discharger satisfies three enumerated requirements relating to the environmental effects of the discharge. 33 U.S.C. § 1311(g)(1).

least a limited opportunity for variances must be inferred from the law in order to uphold EPA's authority to issue uniform BPT limitations. 430 U.S. at 128.

The "reasonable further progress" condition in Section 301(c) is meant to assure that BAT requires more pollution control than BPT. This must be true for each source, as well as for whole industrial categories. Under Section 301(c), it is not enough that a discharger show economic inability to meet BAT; he must also show that lesser requirements will ensure progress toward eliminating pollutant discharges. This progress must be toward "zero discharge," *not* toward BAT. The baseline for progress is the BPT requirements to which that source was subject: either the uniform BPT limitations or, if a BPT variance has been obtained, the limitation specified therein. Thus, under the statutory scheme, as elaborated in *duPont*, it is impossible for any source to be subject to more onerous requirements in 1977 than in 1984.

The relationship between uniform BPT limitations and the BPT variance is central to this case. Under *duPont*, BPT limitations must be both uniform and capable of flexible implementation. In determining whether the requirements of *duPont* have been met, one must assess the combined impact of the regulations and the variance provision.

While effluent limitations are published for entire point-source categories, each category is subdivided so that only those sources which are similar will be subject to the same limitations.<sup>14</sup> In this manner, some flexibility is built into the regu-

<sup>14</sup> This Court approved the use of subcategories in *duPont*. After discussing portions of the legislative history that called for ranges of best practicable levels, the Court observed: "if construed to be consistent with . . . what we have found to be the clear statutory language, this language can be fairly read to allow the use of subcategories based on factors such as size, age, and unit processes, with effluent limitations for each subcategory normally based on the performance of the best plants in that subcategory." 430 U.S. at 132 n. 21.

lations themselves by considering technical and other variations among the dischargers to the extent possible in a general rulemaking. The need for case-by-case variations at the permit stage is reduced significantly by the use of subcategories. *Weyerhaeuser*, 590 F.2d at 1040.<sup>15</sup>

EPA's limited variance provision affords additional flexibility. Recognizing that some dischargers might not fit the assumptions upon which EPA based the uniform regulations, the Agency (and this Court in *duPont*) thought it necessary to make some allowance for anomalies at the permit stage.<sup>16</sup>

<sup>15</sup> In *Weyerhaeuser*, for example, the court discussed the relationship between subcategories and variances, noting that both mechanisms contribute toward the minimum flexibility required by *duPont*:

Although the variance must prevent the regulations from having a greater overall impact on an individual mill than the Act authorizes the general regulations to have on the industry, the one designed by EPA . . . accomplishes this goal. Because EPA, in devising the limitations, undertook a meticulous effort to obtain all relevant information from all available sources including the industry itself, and attempted to account for that information in all its diversity, the Agency has built a significant degree of flexibility into the regulations themselves.

Thus, to a great degree, the Agency has accounted for cross-industry, and even "cross-subcategory," differences in establishing the limits. Allowing for variances based on slight or moderate differentials at individual plants would accordingly ignore the liberality that is already built into the system. It would allow for variances when the impact on an individual did not exceed the range of impacts considered by the Agency for the industry generally.

590 F.2d at 140.

<sup>16</sup> The Agency's variance clause is published as a part of each BPT regulation. E.g., 40 C.F.R. §§ 434.22, .32, .42 (coal mining category); 40 C.F.R. §§ 436.33, .43 (mineral mining and processing category). The variance clause provides, in part:

(footnote continues)

There may be anomalous situations in which data about peculiar conditions at certain plants do not emerge in the general rulemaking. But even when such data are available at the rulemaking stage, limited variances may be necessary to avoid having to establish an inordinate number of subcategories. Rather than sacrifice the uniform nature of the regulations in the name of flexibility, EPA might establish relatively fewer subcategories and rely upon the variance to adjust discharge limits for unusual circumstances.

Nevertheless, the *structure* of EPA's variance provision helps to ensure that the uniformity of the limitations will not fall victim to wholesale variances. A variance may be granted only on the basis of a plant's characteristics which are "fundamentally different" from those EPA considered in the BPT rulemaking. *E.g.*, 40 C.F.R. §§ 436.33, .43 (variance provision for the mineral mining and processing category); see *Weyerhaeuser*, 590 F.2d at 1040. The applicant is permitted to demonstrate, for example, that its cost-effectiveness *ratio* (not its *cost*) is fundamentally different from the ratio EPA calculated for the industry as a whole. Moreover, each applicant for a variance must make at least an initial showing that these fundamental differences exist, and that the cumulative effect of the differences justifies a variance. These burdens on the applicant make it somewhat more difficult at the permit stage to persuade EPA to alter uniform BPT limitations than would be the case at the rulemaking stage. Consequently, dischargers are encouraged to come forward with data prior to the final rulemaking that will facilitate EPA's development of sound, flexible regulations. *Cf. BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) (problems caused by lack of industry data).

(footnote continued)

In establishing the limitation set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors . . . which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry.

Similarly, the *scope* of the variance—i.e., the factors to be considered—is relevant to determining whether BPT effluent limitations are sufficiently flexible without sacrificing uniformity. Under the Administrator's interpretation, the only anomalies which may be considered in variance applications are those which relate to the generic considerations, or factors, that must be taken into account in the BPT rulemaking. Other kinds of anomalies are irrelevant because they would introduce considerations that are foreign to the concept of BPT. In EPA's parlance, the BPT variance is a "redefinition" of BPT for individual dischargers. See *Withdrawal of Interpretations*, 43 *Fed. Reg.* 50042 (October 26, 1978). Thus, even though modified BPT requirements may be less stringent than uniform BPT limitations, conceptually they must represent BPT for that discharger. *In re Louisiana-Pacific Corp.* 10 ERC 1841, 1851 (Decision of the Administrator, September 15, 1977).<sup>17</sup>

For this reason, the government's petition asks the Court to limit the kinds of anomalies which EPA must consider at the permit stage to those specified in Section 304(b)(1)(B) of the Act. Specifically, the Court must decide whether EPA is required or permitted to consider the factors set forth in Section 301(c) when deciding requests for variances from BPT. In *Weyerhaeuser*, the D.C. Circuit ruled that EPA need not do so with respect to BPT limitations for the paper industry. In the *Appalachian Power* decisions (steam-electric power industry), *National Crushed Stone* (mineral mining industry) and *Consolidation Coal* (coal mining industry), the Fourth Circuit ruled that EPA must.

As noted above, EPA's interpretation of the variance clause can be traced directly to this Court's decision in *duPont*. There, the Court concluded that the Act authorizes EPA to promulgate uniform, single-number effluent limitations for en-

<sup>17</sup> Similarly, the D.C. Circuit pointed out that the Section 301(c) variance permits a case-by-case reassessment of the statutory factors used to establish uniform BAT limitations. See *Weyerhaeuser*, 590 F.2d at 1034-35.

ture categories of point sources. 430 U.S. at 128. The Court found that the Act unambiguously provided this authority with respect to BAT by using the language "for categories and classes of point sources" to describe those limitations. *Id.* at 126-27 (citing 33 U.S.C. § 1311(b)(2)(A)). Congress used different language to describe BPT effluent limitations: "for point sources." 33 U.S.C. § 1311(b)(1)(A). Nevertheless, the Court drew upon the Act's purposes and the Administrator's interpretation of it to uphold the Agency's BPT rulemaking authority "so long as some allowance is made for variations in individual plants . . . ." *Id.* at 128. Thus, rather than requiring EPA to define BPT in each permit, the Court allowed a uniform limitation in the regulations, to be followed by an opportunity for reconsideration of that limitation in those circumstances which warrant variations. The Court believed that it was "premature," however, to consider "whether EPA's variance provision has the proper scope." *Id.* at 128 n.19.<sup>18</sup>

<sup>18</sup> After the Court's decision in *duPont*, the Administrator made it abundantly clear which kinds of fundamental differences may be raised in support of applications for BPT variances. See *in re Louisiana-Pacific Corp.*, 10 ERC 1841 (decision of the Administrator, Sept. 15, 1977); Withdrawal of Interpretations, 43 Fed. Reg. 50042 (Oct. 25, 1978).

The government has suggested that this case presents a substantial ripeness question because the variance clause has not been applied in the context of a specific application. Petition for Writ of Certiorari at 20-22. Amicus NRDC believes the issue in this case is sufficiently clear and proper for review. The question arises as a subsidiary issue within the broader question of whether EPA's BPT regulations for these two categories are valid. As this Court noted in *duPont*, the Administrator's authority to promulgate uniform BPT limitations depends upon a sufficient allowance for flexibility in implementing those regulations. The validity of uniform limitations can be challenged only in the Court of Appeals within 90 days following promulgation (33 U.S.C. § 1369(b)(1)(E)), and if not raised at that time, cannot be addressed in enforcement proceedings. 33 U.S.C. § 1369(b)(2). Thus, as the D.C. Circuit noted in *Weyerhaeuser*, it is necessary as a "threshold" matter to determine whether the uniform BPT limitations are valid under the requirements of *duPont*. 590 F.2d at 1032. That determination, in turn, depends on the flexibility of the variance provision.

The D.C. Circuit and the Fourth Circuit have taken somewhat different approaches toward determining the necessary scope of the variance clause. The D.C. Court confined its inquiry to whether the variance provision was capable of satisfying the purpose for which it was required: to afford the minimum flexibility upon which this Court in *duPont* conditioned EPA's authority to promulgate uniform BPT limitations. *Weyerhaeuser*, 590 F.2d at 1033. Under that standard, the court held that the Administrator need only consider the factors, set forth in Section 304(b)(1)(B) of the Act, which EPA considered in the rulemaking. *Id.* at 1036. Accordingly, if a plant's costs relative to the degree of its effluent reduction are not fundamentally different from those which could have been demanded of the industrial category, a variance need not be granted. *Id.*

The Fourth Circuit agreed that the variance factors "ought ordinarily to be as broad as the factors relied upon in establishing the limitation if the [variance] provision is to have meaning." *Appalachian Power* [1976], 545 F.2d at 1359. However, though economic capability is not one of the factors EPA must consider in setting BPT limitations, the court held that EPA "may not exclude the [§ 301(c)] factors to be considered in granting variances under the [BAT] standards . . . ." *National Crushed Stone*, 601 F.2d at 124. The court noted correctly that "the statute contemplates there be more stringent standards in 1983" than in 1977. *Id.* But the court was of the opinion that the Section 301(c) "economic capability" factor must be considered in granting BPT variances, as well as BAT variances, so as to preserve this pattern of increasing stringency. *Id.*<sup>19</sup>

The potential administrative burdens of the Fourth Circuit's holding are substantial. At present, EPA must process

<sup>19</sup> Consolidation Coal merely adopts this holding and analysis. 604 F.2d at 244. *Appalachian Power* [1980] follows the court's prior decisions without comment. (App. at 12a).

NPDES permit applications from tens of thousands of dischargers. See *duPont*, 430 U.S. at 132.<sup>20</sup> Under the Fourth Circuit's decision, EPA must respond to a plausible showing by any applicant that it cannot absorb BPT compliance costs. The Agency will be compelled to decide whether the discharger would be forced to close, reduce production, forego expansion and modernization, or take other serious measures as a result of BPT requirements. In each case, either the Administrator will have to accept the applicant's representation that such impacts are inevitable, or he will have to undertake his own analysis of the discharger's business judgment to show that they are not.<sup>21</sup>

These proceedings will be complex, costly and cumbersome. EPA's experience with a similar kind of inquiry indicates what can be expected. In 1976, EPA investigated, under Section 507(e) of the Act, a claim by the Ketchikan Pulp Company that economic constraints would force the company

<sup>20</sup> As noted above, EPA intends to provide similar variances from pretreatment standards. See discussion at 3, *supra*, note 3. Pretreatment standards apply to "indirect" dischargers which are not subject to NPDES permit requirements. Nevertheless, EPA will have to conduct variance application proceedings for these dischargers. At least 55,000 such dischargers will be subject to pretreatment standards by 1983, and a substantial number of these could be added to the Agency's existing administrative case load when this variance becomes available. 43 Fed. Reg. 27736 (June 26, 1978).

<sup>21</sup> This shift of the burden of persuasion to EPA will be accompanied by tremendous political pressure on the Agency's permit writers. The D.C. Circuit, for example, was concerned that EPA and state permit writers will be unable to respond effectively to economic variance requests:

A more difficult question surrounds the relevance and importance of economic hardship. The issue is crucial, of course, because those mill operators who are most hard pressed economically will be the most likely to pursue vigorous variance demands. Moreover, when faced with the ultimate threat of economic hardship—plant closure, with attendant unemployment and regional economic dislocation—the local permit-granting agency will find it difficult to resist a plea for a variance.

*Weyerhaeuser*, 590 F.2d at 1036.

to close its pulp mill if BPT limitations were required.<sup>22</sup> The Agency hired several economic consulting firms and conducted extensive discovery of Ketchikan's financial position. Hundreds of thousands of dollars were expended, and the Administrator assigned several enforcement officers, attorneys, engineers and economists to the task for over a year. Even after this effort, the issues were not resolved.

The Ketchikan investigation illustrates, on a small scale, the tremendous administrative difficulties EPA would face under the Fourth Circuit's mandate. Thus, the Court's decision in this case will have a major effect on the efficiency, uniformity and promptness with which the Act is to be administered. In the Argument which follows, we turn to NRDC's principal contention: Congress could not have meant for EPA to shoulder such a burden, or it surely would have stated that intention clearly in the Act.

## SUMMARY OF ARGUMENT

The result reached by the D.C. Circuit in *Weyerhaeuser v. Costle* is correct. There, the court upheld a BPT variance clause which, as interpreted by the Administrator, includes the statutory factors specified in Section 304(b)(1)(B), but excludes consideration of the "economic capability" factor set forth in Section 301(c) of the Act. 590 F.2d at 1039, n.38. This conclusion is supported by two alternative lines of analysis.

<sup>22</sup> Section 507(e) provides, in part, that "[t]he Administrator shall . . . investigat[e] threatened plant closures or reductions in employment allegedly resulting from [effluent] limitations . . ." 33 U.S.C. § 1367(e). Such investigations result only in reports to Congress, not regulatory or enforcement actions. The Ketchikan investigation was the only such proceeding ever undertaken by EPA pursuant to this provision. It produced an extensive record, but was terminated when EPA settled a related enforcement action against the company. See *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83 (D. Alas. 1977).

First, both the Act and its legislative history demonstrate that Congress made a conscious decision to exclude considerations of economic capability from the calculation of BPT requirements for individual dischargers. At the BPT stage, Congress prescribed a cost-effectiveness test. The Administrator need only assess the costs of BPT in relation to the resulting effluent reductions. He need not consider whether a discharger will be able to afford those costs. This conclusion is underscored by the fact that Congress made the explicit economic escape valve in Section 301(c) applicable only to the more costly BAT limitations, and by Congress' acceptance of the likelihood that BPT limitations would force some plants to close. Moreover, by its terms Section 301(c) requires that a discharger's modified limitations result in "reasonable further progress" *beyond* BPT, a condition which obviously cannot be met in applying Section 301(c) to grant a variance *from* BPT.

Second, as the result in *Weyerhaeuser* demonstrates, the scope of EPA's variance must be consistent with the Act's concept of *uniform* BPT limitations. The Act, as interpreted in *duPont*, authorizes a two-tiered regulatory scheme consisting of uniform BPT effluent limitations followed by opportunities to *reassess* BPT at the permit stage if unusual circumstances are encountered. Thus, the sole purpose of the BPT variance is to reconsider BPT for individual dischargers, and to thereby calculate case-by-case BPT limitations wherever warranted. By analogy, Section 301(c) provides for reconsideration of the BAT factors and, if warranted, modification of the uniform BAT requirements.

With respect to considerations of cost and economic capability, Congress has set forth radically different factors to define BPT and BAT. Accordingly, concepts peculiar to BAT—the Section 301(c) factors—must not be engrafted onto BPT, as the decisions under review require. The Fourth Circuit would require the Agency to do far more than reassess BPT for fundamental differences in statutorily relevant factors; it would require EPA to change the BPT calculus by adding the

statutorily proscribed concept of affordability. Consequently, dischargers which obtain a variance based in part on considerations of affordability, will be permitted to utilize less than the best practicable technology, as defined by Congress. This result is neither required nor permitted by the Act.

## ARGUMENT

### I. The Act Neither Requires Nor Authorizes the Administrator To Consider Modifying BPT Limitations On the Economic Capability Grounds Specified In Section 301(c).

In resolving this case, as in *duPont*, the Court must apply the language of the Clean Water Act and the intentions of the Act's authors. The scheme of the Act is detailed and comprehensive. It prohibits point-source discharges of all pollutants except in compliance with certain uniform standards. 33 U.S.C. § 1311(a). It states the criteria for developing and issuing those standards. It authorizes variances and time extensions for some standards while providing none for others.<sup>23</sup> And where the Act affords relief from uniform standards on the basis of affordability, it states that intention explicitly.<sup>24</sup>

<sup>23</sup> In addition to Sections 301(c) and 301(g)(1), discussed at 11, *supra*, the Act contains a variety of provisions for relief from uniform standards and compliance deadlines. Section 309(a)(5) authorizes extensions of time to comply with BPT effluent limitations. 33 U.S.C. § 1369(a)(5). Section 301(h) allows the Administrator to waive the requirement of Section 301(b)(1)(B) that municipalities install secondary treatment by July 1, 1977 (33 U.S.C. § 1311(h)), and Section 301(i) permits extensions of that deadline for both municipalities and associated indirect dischargers. 33 U.S.C. § 1311(i). BAT effluent limitations must be relaxed for certain "conventional" pollutants in accordance with the cost-effectiveness analysis prescribed by Sections 301(b)(2)(E) and 304(b)(4). 33 U.S.C. §§ 1311(b)(2)(E), 1314(b)(4). And in certain circumstances, uniform pretreatment standards required by Section 307(b) must be eased to the extent that municipalities receiving pre-treated wastes are capable of achieving additional pollutant removal. 33 U.S.C. § 1317(b)(1).

<sup>24</sup> See discussion at 11, *supra*; note 31, *infra*.

In view of the thoroughness of the Act's regulatory scheme and the attention Congress gave to considerations of affordability, special care should be taken to give the Act its literal meaning. Recognition must be given the Act's omissions as well as its commands. As this Court observed in a similar context, "[t]he question . . . is what Congress intended for *these* regulations." *duPont*, 430 U.S. at 138 (emphasis in the original).<sup>25</sup> If Congress intended that EPA would consider economic hardship in granting variances from these regulations, it surely would have provided that authority in the Act.

In *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the Court outlined the proper analysis for this case. There, the Court considered whether the Administrator, in approving state implementation plans under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, may consider the technological and economic feasibility of meeting the plans' requirements. 427 U.S. at 256. The Court noted the "technology-forcing character" of the statute's requirements for state plans, and held that the eight criteria Congress had specifically set forth in Section 110(a)(2) were the only factors the Administrator could consider in assessing such plans. *Id.* at 257. The Court stated: "[I]f a basis is to be found for allowing the Administrator to consider such claims [of infeasibility], it must be among the eight criteria . . ." *Id.*

It was urged that one of these criteria—requiring that various standards be met as expeditiously as "practicable" or

<sup>25</sup> The quoted passage comes from that portion of *duPont* in which the Court rejected any variance from the uniform "standards of performance" for new sources that are required by Section 306 of the Act. The Court of Appeals had ordered EPA to "come forward with some limited escape mechanism for new sources," reasoning that "[p]rovisions for variances, modifications and exceptions are appropriate to the regulatory process." *E. I. duPont de Nemours v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976). In rejecting the Fourth Circuit's rationale, the Court stressed that Congress' intentions must be the basis for decision. The Court should be guided by the same principle here.

within a "reasonable" time—provided the basis for considering feasibility. *Id.* at 257-58. Carefully analyzing the statute and its history, the Court disagreed. *Id.* Most important, the Court supported its conclusion by observing that "[w]here Congress intended the Administrator to be concerned about economic and technological feasibility, it expressly so provided." *Id.* at 257, n. 5. Since section 110(a)(2) contained no such language, the Court held that "claims of economic or technological infeasibility may not be considered by the Administrator." *Id.* at 265.

Similarly, the Clean Water Act contains no authority—either directly or, as in *duPont*, by implication—for the Administrator to modify BPT in response to claims of economic hardship. With respect to technology based controls, the Act's only variance for economic hardship is Section 301(c), which applies exclusively to BAT limitations. The Administrator has fashioned the BPT variance provision as a "limited"<sup>26</sup> variance which serves only to afford minimum flexibility in implementing the BPT regulations, as required by *duPont*. As such, the variance excludes economic considerations, and should not be expanded unless the Court finds overwhelming reasons to do so.

Congress could not have been clearer that Section 301(c)'s economic capability test applies only to BAT. Section 301(c) states: "[t]he Administrator may modify the requirements of subsection (b)(2)(A) of this Section . . ." 33 U.S.C. § 1311(c); see *duPont*, 430 U.S. at 121.<sup>27</sup> Moreover, Section

<sup>26</sup> See *duPont*, 430 U.S. at 124. Similarly, in *Weyerhaeuser* the D.C. Court of Appeals stressed that a narrowly defined variance provision "assures that the pin-hole safety valve envisioned in the Act and *duPont* does not become a yawning loophole." 590 F.2d at 1040.

<sup>27</sup> NRDC contends that this language is dispositive with respect to the specific issue raised in this case. Where Congress speaks explicitly in one context but is silent in another where it might have acted in similar fashion, courts properly give considerable weight to

(footnote continues)

301(c) does not apply *at all* until *after* the BPT compliance deadline of July 1, 1977. *Id.* Finally, one condition of Section 301(c) is that even the discharger's modified BAT limitations will result in "reasonable further progress" toward the elimination of pollutant discharges. *Id.* This "further" progress must go beyond the *initial* progress required by BPT limitations.<sup>28</sup> Applying Section 301(c) to BPT would require the impossible result that a variance from a standard must assure progress beyond the standard itself.

Congress' statutory plan is sensible and internally consistent. It is not surprising that the Act provides an economic capability variance for BAT but authorizes none for BPT. Congress considered BPT to be within the reach of all but the marginal plants, and decided that if a source could not afford even BPT, it should close.<sup>29</sup> BAT, however, is expected to be more onerous than BPT.<sup>30</sup> Congress therefore afforded case-by-case relief for those dischargers which had achieved the BPT

(footnote continued)

that silence in ascertaining the legislative intent. Congress should be deemed to have decided that similar circumstances do not warrant the same treatment. *Union Electric*, 427 U.S. at 257. This rule should apply with special force where, as here, Congress has carefully developed a comprehensive and detailed statutory scheme.

<sup>28</sup> The remarks of Congressman Jones, Chairman of the House Conferees on the 1972 amendments, leave no doubt that recipients of Section 301(c) variances must demonstrate progress *beyond* the BPT baseline: "This provision in section 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirements . . . . This provision is not intended to justify modifications which would not represent an *upgrading over the July 1, 1977 requirements of [BPT]*." 1 *Leg. Hist.* 232 (emphasis added).

<sup>29</sup> See discussion at 26-27, *infra*.

<sup>30</sup> See discussion at 10, *supra*.

baseline, but which encountered great economic hardship in going further.<sup>31</sup>

The Act's legislative history amply supports this view. The Conference Report left no doubt that EPA may consider economic hardship under Section 301(c) only at the BAT stage:

The conferees intend that the Administrator . . . will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on [BAT]. The burden will be on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants.

1 *Leg. Hist.* 304. Moreover, in addition to limiting Section 301(c) to BAT, this passage demonstrates that Congress refused to give the Administrator *any* responsibility to assess the economic impacts of BPT on individual plants. After quoting this language from the Conference Report, Congressman Dingell restated it in even stronger terms: "Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided." 1 *Leg. Hist.* 255. Senator Muskie<sup>32</sup> agreed, noting

<sup>31</sup> Similarly, Congress authorized economic variances from the "water quality related effluent limitations" called for in Section 302 of the Act. 33 U.S.C. § 1312. These limitations are intended to be even more protective than BAT. A person affected by the Section 302 limitations may have these requirements adjusted where it is shown that "there is no reasonable relationship between the economic and social costs and the benefits to be obtained." *Id.*

<sup>32</sup> As this Court observed in *duPont*, Senator Muskie was the primary author of the 1972 amendments to the Federal Water Pollution Control Act. See *duPont*, 430 U.S. at 129.

that the Conferees specifically decided "to avoid imposing on the Administrator *any* requirement to . . . determine the economic impact of [BPT] controls on any individual plant in a single community." *Id.* at 170. (emphasis added).

The Fourth Circuit's error is not mitigated by the fact that the holding requires EPA merely to *consider* an applicant's economic analysis together with other facts.<sup>33</sup> Since Congress *singled out* economic hardship as the primary factor to be excluded from the determination of individual BPT requirements, EPA may not consider that factor. See *Union Electric*, 427 U.S. at 265. As discussed above,<sup>34</sup> the Fourth Circuit's position will, as a practical matter, compel EPA to do what Congress forbade.

The conclusion that BPT has no economic escape valve is underscored by Congress' awareness that the consequences of BPT might be severe. Congress was determined to establish a

<sup>33</sup> The result in *United States v. Chevron Oil Co.*, 583 F.2d 1357 (5th Cir. 1978), illustrates how EPA will be compelled to do much more than "consider" an applicant's analysis. That case involved the government's attempt to enforce a civil penalty that had been assessed against Chevron by the U.S. Coast Guard under Section 311 of the Act in connection with an oil spill. Under Section 311 (as it appeared at the time of Chevron's spill), liability for the penalty arises whenever oil is discharged in excess of the "harmful quantity" established by the President. 33 U.S.C. §§ 1321(b)(3), (b)(6). Exercising this authority, the President had established a uniform harmful quantity as that amount which, "at all times and locations and under all circumstances and conditions," will cause "a film or sheen upon or discoloration of the surface of the water." See *Chevron*, 583 F.2d at 1360.

At an administrative proceeding before the Coast Guard, Chevron introduced evidence that its spill, while violating the government's "sheen test," nevertheless was not harmful under the circumstances of the incident. The government offered no contradictory evidence. The Fifth Circuit held that the government cannot rest on its uniform standard, but "must rebut with evidence that defendant's spill was of a harmful quantity under the circumstances." *Id.* at 1364.

<sup>34</sup> See discussion at 17-19, *supra*.

uniform baseline for industrial dischargers that necessarily would force some marginal plants to cease operations. Such plant closure was a price that needed to be paid to clean up the Nation's waters. See *Weyerhaeuser* 590 F.2d at 1036-37 (citing remarks by Rep. Jones and Sen. Bentsen); cf. *Union Electric*, 427 U.S. at 270 (concurring opinion of the Chief Justice and Justice Powell). Plant closings would not be widespread because BPT was intended to represent only an interim step toward requiring the very best technology. Consequently, no further consideration of a discharger's economic capability was needed at the BPT stage.

Thus, the Act and its history demonstrate that the Fourth Circuit's incorporation of Section 301(c) into the BPT variance is inconsistent with Congress' intent. In addition, the lower court's rationale is flawed by a fundamental misunderstanding of the Act.

First, the court based its conclusion on the observation that "the statute contemplates there may be more stringent standards for 1983." *National Crushed Stone*, 601 F.2d at 124. This interpretation of the statute is correct as a general proposition. But the court erred in concluding that the BPT and BAT variances both must include economic capability in order to accomplish the Act's purposes. It is the *differences* between BPT and BAT—not an identity of variance factors—that fulfills Congress' desire for systematic progress toward elimination of pollutant discharges.<sup>35</sup> Foremost among these differences is the requirement that BAT represent "reasonable further progress"

<sup>35</sup> These statutory distinctions between BPT and BAT are discussed at 9-11, *supra*. In addition, the Act includes a variety of other ways to bring about Congress' ultimate goal of eliminating the discharge of pollutants. The Act contemplates that water quality standards under Section 303 will be strengthened every three years; authorizes extremely stringent controls under Section 302; and provides for toxic effluent standards or prohibitions under Section 307(a) from which no variances are available.

beyond BPT—a requirement found in Section 304(b)(2)(B) and reinforced by Section 301(c) itself.<sup>36</sup>

Second, the Court believed that without an economic capability test in the BPT variance, EPA's regulations "could easily close a plant in 1979 which would be allowed to operate under a variance in 1983." *Id.* This is not true. As explained above, Section 301(c) does not permit EPA to relax BAT to a level that is less stringent than BPT.<sup>37</sup> Indeed, it provides that modified BAT requirements must require progress beyond BPT. Any plant that closes in 1977 because it cannot afford the cost of BPT must necessarily remain closed after 1984, since BAT, even as modified under Section 301(c), may not be less stringent and (barring cost-reducing innovations) less costly than BPT.

## II. The Scope of the Variance Required Below Is Precluded By the Act and The Rationale of *duPont*.

The foregoing analysis shows that Congress did not require or even authorize EPA to include the economic capability factor of Section 301(c) in the BPT variance provision. In addition, NRDC contends that the Act, as construed in *duPont*, precludes such consideration.

In *duPont*, this Court required a variance provision for only one reason: to permit the application of BPT to individual

<sup>36</sup> For this reason, BPT and BAT limitations for a given industrial subcategory ordinarily will not be identical—the situation which primarily concerned the court in *National Crushed Stone*. 601 F.2d at 124. EPA may occasionally promulgate identical BPT and BAT, but such situations are not necessarily inconsistent with the Act. If the Administrator applies the BAT factors and legitimately determines that "further progress" for an industry would not be "reasonable," BAT limitations may be identical to BPT. The Act does not require, or even suggest, that EPA downgrade BPT in these circumstances merely to preserve some room for progress at the next stage.

<sup>37</sup> See discussion at 12, *supra*. As a result, if BPT and BAT are identical for an industrial category, no modification would be available under Section 301(c).

dischargers in a manner sufficiently flexible to justify the issuance of uniform regulations. 430 U.S. at 128. In the face of somewhat ambiguous statutory language,<sup>38</sup> the Court's insistence on a two-tiered regulatory scheme represents a compromise of sorts between absolute, uniform limitations and case-by-case BPT requirements.<sup>39</sup> This balance was struck on the basis of the Act's purposes, the Administrator's interpretation of the Act and, in part, on the analogy afforded by the Section 301(c) variance pertaining to BAT. *Id.* at 127-28, 134-35.

If uniformity is to be maintained as *duPont* indicates, the scope of the BPT variance must be no greater than necessary to achieve its purpose. As discussed above,<sup>40</sup> the provision's purpose is to recalculate BPT for an individual discharger, taking into account any anomalies which set that discharger apart from the rest of the industrial category. A discharger's permit requirements, derived through the BPT variance process, must still represent BPT for that discharger. Accordingly, the scope of the variance must accomplish that result and no more. If economic capability is considered for an individual discharger—while the same consideration is excluded for the industry as a whole—the BPT variance will become a license for any marginal plant to avoid BPT.

The D.C. Circuit adopted this reasoning in *Weyerhaeuser*. There, the Court stressed that the Act's emphasis on uniformity, within the bounds set by *duPont*, would necessarily force the

<sup>38</sup> See discussion at 16, *supra*.

<sup>39</sup> The petitioners in *duPont* sought a ruling that BPT limitations must be established at the permit stage. There is no suggestion in *duPont* that the Court would have approved the notion of considering economic hardship in BPT permit proceedings if it had decided against uniform limitations. Quite the contrary, the Court noted that the Senate Report contemplated that only the Section 304(b)(1)(B) factors should be considered at the permit stage. 430 U.S. at 132 n. 21.

<sup>40</sup> See discussion at 15, 17, *supra*.

closure of marginal plants. This result, the court thought, could not be changed by the BPT variance clause:

[T]he Act's supporters in both Houses acknowledged and accepted the possibility that its 1977 requirements might cause individual plants to go out of business. They self-consciously made the legislative determination that the health and safety gains that achievement of the Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes to the present generation. They accordingly authorized EPA to impose effluent restrictions that they knew might shut down parts of regulated industries . . . . The Agency, in turn, has projected that its limitations for the paper industry may shut down eight marginal mills . . . , and *the variance provision need not protect these or other individuals from impacts authorized for the industry as a whole.*

590 F.2d at 1036-37 (emphasis added) (citations omitted).

Accordingly, the court in *Weyerhaeuser* interpreted *duPont*'s "flexibility" standard as requiring that the BPT variance be "analogous" to the statutory variance contained in Section 301(c). 590 F.2d at 1034. *Weyerhaeuser* holds that under *duPont* the BPT variance factors need only reflect the factors used to establish BPT limitations. With respect to costs, the BPT variance is legally sufficient if it provides for the cost-effectiveness test set forth in Section 304(b)(1)(B), just as Section 301(c), by analogy, includes the economic capability test used to develop BAT. *Id.* at 1035-36.<sup>41</sup> This formulation,

<sup>41</sup> The result in *Weyerhaeuser* is supported by the Senate Report on the 1972 amendments:

In determining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include [those listed in Section 304(b)(1)(B)] . . . . In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.

<sup>2</sup> *Leg. Hist.* 1468.

together with the requirement that differences regarding the BPT factors be "fundamental," ensures that the uniformity of the regulations will not be undermined. *Id.* at 1039-40.

The Seventh Circuit's holding in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), also is instructive. There, U.S. Steel petitioned for review of EPA's order issuing an NPDES permit to the Company's Gary Works. Earlier, in *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975), the Third Circuit had remanded BPT limitations for the steel industry because of the Agency's failure to establish ranges of effluent reductions. For this reason, the Administrator had sought additional data in order to develop an individual BPT permit for the Gary Works. In *United States Steel*, noting that this Court in *duPont* had approved the use of single-number effluent limitations instead of ranges, the Seventh Circuit said that EPA should have treated the proceeding as a variance application. 556 F.2d at 844. Nevertheless, the court held that EPA's process was the functional equivalent of applying the BPT variance clause:

The agency's reexamination of the BPT issue as if it were obligated to determine BPT for the Gary Works individually was the equivalent of determining whether there were fundamentally different factors at that plant which made BPT impracticable there and thus justified a variance from nationally applicable limitations based on BPT.

*Id.* at 845. Thus, while not addressing the "fundamentality" requirement or the applicant's burden of proof, the court did indicate that a BPT variance amounts to recalculating BPT for an individual discharger using the same factors that are relevant to developing uniform BPT limitations.

*Weyerhaeuser* goes as far as the Act and *duPont* permit. The inclusion of extraneous factors in the variance would require EPA to consider excusing a discharger from using the

best practicable technology that is available under the circumstances. It would result in permit requirements which, both conceptually and in a very real sense, are less protective than BPT. As the D.C. Court feared, EPA's variance would become "a license for avoidance of the Act's strict pollution abatement requirements." *Weyerhaeuser* 590 F.2d at 1035. For this reason, the Fourth Circuit's result is contrary to the rationale of *duPont* and flagrantly inconsistent with the Act.

## CONCLUSION

By requiring EPA to consider the economic capability factor of Section 301(c) in deciding applications for variances from BPT effluent limitations, the decisions below are inconsistent with the Clean Water Act and this Court's holding in *duPont*. The Act neither requires nor authorizes such considerations. Indeed, as interpreted in *duPont*, the Act precludes consideration of affordability in BPT variance proceedings. If any remnant of the uniformity of BPT limitations is to remain, as authorized by *duPont*, the scope of the Agency's variance clause must be confined to those factors used to develop the BPT regulations. The BPT factors, specified in Section 304(b)(1)(B) of the Act, do not include economic capability.

Accordingly, the Court should uphold the Agency's BPT variance clause, and reverse the judgments below on this issue.

Respectfully submitted,

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May 14, 1980

APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Nos.	74-2096,	74-2188,	74-2196,
	74-2236,	74-2263,	74-2264,
	74-2265,	74-2268,	74-2269,
	74-2270,	74-2286,	74-2298,
	74-2312,	74-2313,	74-2315,
	74-2339,	74-2340,	74-2341,
	74-2343,	74-2365,	74-2366,
	74-2396,	75-1014,	75-1020,
	75-1021,	75-1022,	75-1047,
	75-1074,	75-1078,	75-1091,
	75-1094,	75-1095,	75-1198,
	75-1199,	75-1200,	75-1201,
	75-1202,	75-1203,	75-1223,
	75-1255,	75-1345,	75-1346,
	75-1347,	78-1701,	78-1878,
	78-1902		

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APPALACHIAN POWER COMPANY, BALTIMORE GAS  
AND ELECTRIC COMPANY, CAROLINA POWER &  
LIGHT COMPANY, DUKE POWER COMPANY,  
MONONGAHELA POWER COMPANY, OHIO POWER  
COMPANY, POTOMAC EDISON COMPANY, POTOMAC  
ELECTRIC POWER COMPANY, SOUTH CAROLINA  
ELECTRIC & GAS COMPANY, VIRGINIA ELECTRIC  
AND POWER COMPANY, WEST PENN POWER COMPANY

*Petitioners*

v.

RUSSELL E. TRAIN, as Administrator  
ENVIRONMENTAL PROTECTION AGENCY

*Respondent*

ALABAMA POWER COMPANY, *et al.*

JERSEY CENTRAL POWER & LIGHT COMPANY,  
METROPOLITAN EDISON COMPANY and  
PENNSYLVANIA ELECTRIC COMPANY

*Intervenors*

**ON PETITIONS FOR REVIEW OF ACTIONS OF THE  
ADMINISTRATOR OF THE ENVIRONMENTAL  
PROTECTION AGENCY\***

Argued: April 4, 1979      Decided: April 28, 1980

Before BREITENSTEIN,\*\* Senior Circuit Judge,  
WIDENER and PHILLIPS, Circuit Judges.

\* The following Petitions for Review, all naming Train as Respondent, were consolidated:

- 74-2188 — National Rural Electric Cooperative Association
- 74-2196 — Georgia Power Company
- 74-2236 — Tampa Electric Company
- 74-2263 — Indiana & Michigan Electric Company
- 74-2264 — Indiana-Kentucky Electric Corporation
- 74-2265 — Illinois Power Company
- 74-2268 — Pacific Gas and Electric Company
- 74-2269 — San Diego Gas & Electric Company
- 74-2270 — Southern California Edison Company, a California corporation
- 74-2286 — Mississippi Power Company
- 74-2298 — Arkansas Power & Light Company and Arkansas-Missouri Power Company
- 74-2312 — Gulf Power Company
- 74-2313 — Alabama Power Company
- 74-2315 — Boston Edison Company, Holyoke Water Power Company, Nontaup Electric Company, New England Power Company, Public Service Company of New Hampshire, Western Massachusetts Electric Company
- 74-2339 — Consolidated Edison Company of New York, Inc.

- 74-2340 — Pennsylvania Power & Light Company
- 74-2341 — Philadelphia Electric Company
- 74-2343 — Florida Power & Light Company
- 74-2365 — Dairyland Power Cooperative
- 74-2366 — Commonwealth Edison Company
- 74-2396 — Mississippi Power & Light Company, Louisiana Power & Light Company, and New Orleans Public Service, Inc.
- 75-1014 — Western Farmers Electric Cooperative, a corporation
- 75-1020 — Alabama Electric Cooperative, Inc.
- 75-1021 — Buckeye Power, Inc., Indiana and Michigan Power Company, Kentucky Power Company, Ohio Electric Company, Ohio Power Company, Ohio Valley Electric Corporation
- 75-1022 — Brazos Electric Power Cooperative, Inc.
- 75-1047 — Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, Long Island Lighting Company, New York State Electric & Gas Corporation (Intervenors)
- 75-1074 — Corn Belt Power Cooperative
- 75-1078 — Texas Utilities Generating Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company
- 75-1091 — Public Service Electric & Gas Company
- 75-1094 — Union Electric Company
- 75-1095 — Central Iowa Power Cooperative
- 75-1198 — South Texas Electric Cooperative, Inc.
- 75-1199 — Central Power & Light Company and West Texas Utilities Company
- 75-1200 — State of Texas
- 75-1201 — Houston Lighting & Power Company
- 75-1202 — Tennessee Valley Authority
- 75-1203 — Brazos River Authority

- 75-1223 — Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus & Southern Ohio Electric Company, Dayton Power & Light Company, Ohio Edison Company, Toledo Edison Company
- 75-1255 — Union Electric Company, a Missouri Corporation
- 75-1345 — Platte River Power Authority
- 75-1346 — City of Lamar, a municipal corporation of the State of Colorado, and The Lamar Utilities Board
- 75-1347 — Tri-State Generation and Transmission Association, Inc.
- 78-1902 — Appalachian Power Company, et al
- 78-1878 — Natural Resources Defense Council, Inc.
- 78-1902 — Natural Resources Defense Council, Inc.

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**\*\*** Honorable Jean S. Breitenstein, United States Circuit Judge for the Tenth Circuit, sitting by designation.

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#### WIDENER, Circuit Judge:

These actions arise because of EPA amending its regulations to comply with our mandate in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (1976). In *Appalachian Power*, approximately seventy power companies sought review of the Environmental Protection Agency's (EPA) regulations promulgated under authority of the Federal Water Pollution Control Act (Act).<sup>1</sup> The power companies now challenge EPA's amendments to parts of 40 CFR Part 423<sup>2</sup> on grounds that they do not fully comply with *Appalachian Power*. Part 423 sets out the best practicable technology (BPT) limitation standards for the steam electric power industry. Natural Resources Defense

Council (NRDC), through its petitions, also seeks a review of certain EPA BPT regulations, not on the ground that *Appalachian Power* has not been complied with but on the ground that § 301(1), 33 USC § 1311(1), a 1977 amendment to the Act, prohibits EPA from modifying any of § 301, 33 USC § 1311, including BPT limitations, for toxic pollutants. It also challenges the EPA variance amendments on the ground that they did comply with *Appalachian Power* so far as the factors in § 301(c) are referred to in the amended regulations.

In 1972, Congress passed the Federal Water Pollution Control Act (Act) with an ultimate goal of no pollutant discharges into our nation's waters. Toward that ultimate goal, Congress established increasingly stringent standards of pollution control. Phase I of the Act sets best practicable technology (BPT) limitations to go into effect in 1977.<sup>3</sup> In 1983, best available technology (BAT) limitation standards are to go into effect.<sup>4</sup> Several parts of the Act were amended in 1977 but the basic goals and strategies of the Act remain intact. EPA is given broad power under the Act so that it may insure that the phases of improvement can be achieved. In order to carry out its obligation, EPA promulgated regulations setting single number effluent limitations for various industries in order to commence the achievement of the goal of the statute. In *duPont*, we held that EPA had the authority to promulgate such effluent limitations which are to be considered presumptively applicable. *E. I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd* on this point 430 U.S. 112 (1977). Through the regulations, applicable unless rebutted, EPA hopes to achieve national uniformity as the goal of no discharge of pollutants is sought. *Id.* at 1028.

*Appalachian Power* involved a review of many of EPA's regulations promulgated to aid in the application and enforcement of the Act. Only our holding dealing with BPT variance regulations is pertinent to our decision here. Among other

<sup>1</sup> 33 USC § 1251 *et seq.*

<sup>2</sup> Specifically amended were 40 CFR 423.12(a), 423.22(a), 423.32(a) and 423.42.

<sup>3</sup> § 301(b)(1)(A), 33 USC § 1311(b)(1)(A).

<sup>4</sup> § 301(b)(2)(A), 33 USC § 1311(b)(2)(A).

provisions under attack in *Appalachian Power* was EPA's variance clause providing that a variance from the 1977 standards set out in the regulations would be granted when "the factors relating to equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines."<sup>5</sup> Costs were excluded from consideration by EPA's interpretation of its own regulation. We struck down the clause because EPA's refusal to consider costs resulted in too restrictive a view of the minimum content of the variance. Under the 1983 standards set out in the Act, for example, costs were to be a relevant factor. Following our decision in *duPont*, we reasoned that the Act contemplated progressively more stringent standards as the country moved closer to the goal of elimination of pollutant discharge. Therefore, the 1977 standards were not intended to be any less flexible than the 1983 standards. As a result, we remanded the regulation to EPA for the agency to come forward with a meaningful variance clause taking into consideration at least the statutory factors set out in §§ 301(c), 33 USC § 1311(c); 304(b)(1)(B), 33 USC § 1314(b)(1)(B); and 306(b)(1)(B), 33 USC § 1316(b)(1)(B).<sup>6</sup> *Appalachian Power* at 1359-60.

<sup>5</sup> § 423.12(a) interpreted at 39 FR 28926-27 (Aug. 2, 1974), 30073 (Aug. 13, 1974).

<sup>6</sup> § 301(c), 33 USC § 1311(c), provides:

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

§ 304(b)(1)(B), 33 USC § 1314(b)(1)(B), provides that such regulation shall:

(footnote continues)

After the Supreme Court's decision in *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we modified our decision in *Appalachian Power* to exclude the requirement of a variance for new sources, but declined to modify the opinion further.<sup>7</sup> In March 1978, EPA proposed its amendment to the

(footnote continued)

specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

§ 306(b)(1)(B), 33 USC § 1316(b)(1)(B), provides:

As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

<sup>7</sup> No. 74-2096, Order of September 26, 1977.

BPT variance provision. 43 FR 8812-13 (1978). After a comment period, this rule was made final on September 22, 1978. EPA amended 40 CFR Part 423.12(a), 423.22(a), 423.32(a) and 423.42 by adding the following paragraph:

In accordance with the decision in *Appalachian Power*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), EPA's legal interpretation appearing at 30 FR 30073 (1974) shall not apply to this paragraph. The phrase "other such factors" appearing above may include significant cost differentials and the factors listed in section 301(c) of the Act.

43 FR 43025 (Sept. 22, 1978) corrected at 43 FR 44848 (Sept. 29, 1978).

In October 1978, EPA published a notice rescinding its no-cost interpretation of 1974. 43 FR 50042. In October 1978, the utilities filed this action.<sup>8</sup>

The utilities challenge the EPA amendment to the BPT variance provisions, contending that the mandate of *Appalachian Power* has not been met by the addition of "significant cost differentials and the factors listed in section 301(c) of the Act." Specifically, the utilities argue that *Appalachian Power* requires EPA to consider 304(b)(1)(B) factors including "total cost... in relation to effluent reduction benefit."

The utilities concede that the addition of "significant cost differentials and the factors listed in section 301(c) of the Act" to the existing variance provisions on its face could fulfill the *Appalachian* mandate. They argue, however, that EPA has made it clear that effluent reduction benefits are not a relevant factor under the regulation. The utilities urge that EPA's interpretation of effluent reduction benefit is much too narrow

<sup>8</sup> NRDC had filed its original petition on September 28, 1978, in the D.C. Circuit. The utilities and NRDC then filed petitions for review in this court. Upon motion, the D.C. Circuit transferred NRDC's first petition to this court. *NRDC v. EPA*, No. 78-1929 (D.C. Cir. Dec. 21, 1978).

in that it considers only costs in relation to the degree of effluent reduction with no consideration of receiving water quality. Such an interpretation, they urge, is impermissible in light of *Appalachian*.

No variance has been applied for here. Therefore, the utilities' only authority offered to show EPA's application of its newly amended regulations is the February 6, 1979 recommendation of the Assistant Administrator for Water Enforcement of the EPA tentatively turning down Cincinnati Gas and Electric Company's application for a variance for its W. C. Beckjord Station, as well as the case of *In re Louisiana-Pacific Corp.*, 10 ERC 1841 (1977). That document, the utilities contend, shows EPA's rejection of water quality as a factor in considering effluent reduction benefits pursuant to *Appalachian*. There, Cincinnati Gas' application for a variance from pH limitations was turned down because no fundamental difference was found to justify a less stringent standard. In commenting on receiving water quality, the Office of Enforcement of the EPA included in its recommendation to the Administrator the following:

The Administrator has determined *In the matters of Louisiana Pacific Corporation* NPDES No. CA0005894 and *Crown Simpson Pulp Company* NPDES No. CA0005882 10 ERC 1841 (September 16, 1977) ("*Louisiana Pacific*") that EPA is not authorized to grant a FDF variance providing relief from technology-based limitations guidelines due to the characteristics of the receiving water. The type of receiving water or the fact that the receiving water quality will not be harmed by the discharge or measurably improved by installing control equipment are not legally fundamental differences.

Recommendation on Variance Ruling FDF 78-01 at pp. 7-8.

We think the utilities' reliance on the recommendation in the Cincinnati Gas and Electric variance recommendation is misplaced. First and principally, the Administrator has not yet taken any action with respect to the variance. That being so, we

do not believe that, even assuming the utilities' construction of the recommendation to be correct, the recommendation of the Office of Enforcement to the Administrator is legally binding on the Agency. While it may have considerable significance, legal as well as practical, to the parties involved, it is little if anything more than an in-house memorandum from a subordinate in the Agency recommending to the Administrator the action he should take in passing on the requested variance. Second, the language we have above quoted, which is that upon which the utilities rely, we do not believe, read in context, can be taken to say that the Administrator in no instance will consider the quality of the receiving water as a part of the evidence in a case requesting a variance. Read literally, the language simply means that the quality of receiving water of itself is not a fundamental difference upon which a variance can be granted. This is entirely consistent with that part of our ruling in *Appalachian Power* in which we denied the claim of Consolidated Edison that it ought to be allowed to discharge into New York harbor not subject to effluent limitations because the harbor was already so dirty the addition of its effluent would make no difference. From an examination of the papers on hand in the Cincinnati Gas and Electric Company variance No. FDF 78-01, we believe, however, that the variance was not sought solely or even principally because of the water quality of the Ohio River into which the effluent flowed. Rather, it was based principally upon cost differentials and a claim that the addition of sulphuric acid to its settling ponds to reduce their alkalinity would do more harm to the receiving water than the effluent in question in that case.

Much the same remarks apply to EPA's decision in *In re Louisiana-Pacific Corp.*, 10 ERC 1841 (1977). In that case the claim of the industry was that a discharge of its effluent into the ocean would do no harm apparently because the ocean waters were so vast. The Administrator denied that variance, again entirely consistent with our opinion in *Appalachian Power*, concluding that he could provide no "...relief from

technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters. . . ." He stated that he could not permit exemption where the type of receiving water is the fundamental difference between the seekers of the variance and other pulp and paper mills. In his opinion, the Administrator time and again made it plain that the only thing he acted upon was a request for a variance based solely on water quality. At no place in that decision did the Administrator indicate that he did or would hold that the quality of the receiving waters was irrelevant in all instances in variance proceedings. It is true EPA does take that position in its brief in this court: "Receiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." Brief at p. 13. But as the mere recommendation of a subordinate does not bind the Agency,<sup>9</sup> neither does the mere assertion of an attorney in a brief except for the purposes of that case.

<sup>9</sup> The Deputy Assistant Administrator for Water Enforcement, who made the recommendation in *Cincinnati Gas and Electric Co.*, acts only as the principal adviser to the Administrator of EPA on matters of enforcement. 40 CFR § 1.31. Thus, his decision is not binding on the Administrator. In like vein, we held that a decision of the Provider Reimbursement Review Board, an in-house-board, does not bind the Secretary of HEW, who can modify or reverse that decision on his own motion. *Fairfax Hospital Ass'n, Inc. v. Califano*, 585 F.2d 602 (4th Cir. 1978). See also e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (NLRB rejected examiner's findings); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (Administrator decided contrary to the conclusion of the Hearing Examiner regarding the banning of DDT); *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974) (FTC overruled Administrative Law Judge's finding that Coors had not violated § 5 of the Federal Trade Commission Act); *Peterson v. Gardner*, 391 F.2d 208 (2d Cir. 1968), (Appeals Council can rule contra to decision to the Hearing Examiner); *Alcoa Steamship Co. v. Federal Maritime Commission*, 321 F.2d 756 (D.C. Cir. 1963) (Maritime Commission rejected recommendation of examiner and approved pooling agreement); *Braswell Motor Freight Lines v. USA*, 275 F.Supp. 98 (W.D. Texas 1967), aff'd 389 U.S. 569 (1968) (ICC rejected recommendation of its examiner).

Much as we disagree with the statement, there has been no application of it in the case before us, and no binding statement has been made to that effect by the Administrator. We will have to await a proper case to see if the Administrator in actual practice, or in the administration of the statute, takes the same extreme position his attorneys do in the brief in this case. No such extreme position can be read into the *Louisiana-Pacific* or *Cincinnati Gas* variance cases.

Because we believe the amendment of the variance provision will admit consideration of all of the factors required in our opinion, and there has been no concrete application denying a variance request which is under review, we decline to set aside EPA's amended regulations as a noncompliance with our mandate.<sup>10</sup>

EPA and NRDC also ask us to reconsider our holding in *Appalachian Power* to the effect that § 301(c) factors are applicable in consideration of variances from BPT limitations. *Id.* at 1359-60. This issue was dealt with again by this court in *National Crushed Stone Assoc. Inc. v. EPA*, 601 F.2d 111 (4th Cir. 1979), and in *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), cert. granted 48 L.W. 3513 (1980). In those cases the industries successfully sought application of *Appalachian Power's* BPT variance holding outside the steam electric industry to which EPA had limited our holding in *Appalachian*. We declined to change our *Appalachian Power* variance holding in those cases, and we decline to do so here.

We should note at this point that EPA continues to argue from extreme positions which we do not believe are justified by the statute, and even are not justified by the actions of the

<sup>10</sup> The utilities also rely upon EPA's comments published with its amendment of the variance provisions in 40 CFR Part 423. 43 FR 40324 (Sept. 22, 1978), typographically corrected at 43 FR 44847 (Sept. 29, 1978). The comments no more than reflect the ruling in *Louisiana-Pacific*, *supra*, and are not contrary to our mandate in *Appalachian Power*.

Administrator as distinguished from the language in his brief. EPA's principal argument in this case is shown by an example it gives that a discharger of a copper compound might be granted a variance if it were on a clean river but not if it were on a dirty river. The example misses the point. If the discharger were economically able [sic.] to correct its condition of violation *and* if its efforts resulted in reasonable further progress toward meeting the standard, then there is no reason to necessarily exclude the issuance of a variance. But if the continued discharge, during the time it took the industry to comply, might kill all aquatic life in the river, it might easily be said that the progress was not reasonable, while, if the discharge did little or no actual harm during this period, it might just as easily be said that reasonable progress was being made. To determine whether or not progress is reasonable, we repeat, it may be appropriate to consider water quality as *a factor*, that is to say as an item of evidence. Its sought-for arbitrary exclusion by EPA is simply too rigid a construction of the statute, and we do not believe it is justified. To hold otherwise ultimately can only result in regulation for regulation's sake, at which point, of course, a serious question of constitutional limitations would arise. We believe this useful statute deserves better treatment.

NRDC's petitions request us to hold that variances from BPT limitations cannot be granted to a discharger of toxic pollutants because of a 1977 amendment to the Act, which states:

The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) [33 USC § 1317(a)(1)]

§ 301(1) of the Act, 33 USC 1311(1).

It is the contention of NRDC that the amendments to the various regulations should have as required content a prohibition against issuing a variance from BPT limitations on account of toxic pollutants.

33 USC § 1317(a)(1) (§ 307(a)(1) of the Act) requires the Administrator to publish a list of toxic pollutants. Upon designation of a pollutant as toxic, § 307 (a)(2) [33 USC § 1317(a)(2)] goes into effect, requiring the EPA to set BAT standards for those pollutants.

As now interpreted by EPA, the variance clause applies to all pollutants for which BPT limitations are set by regulations. The BPT limitations for the steam electric industry include pollutants which are on the toxic pollutant list in 40 CFR Part 129. As noted, because of § 301(1), NRDC contends that EPA in a repromulgation of its variance regulations must in terms exclude toxics from their coverage. EPA and the utilities contend that § 301(1) was not intended to apply to BPT, but only to the specific sections of § 301 which allow an operator to be relieved of an effluent limitation. They also argue that a BPT variance is not a true variance so as to bring § 301(1) into effect. BPT variances, the argument goes, do not excuse anyone from meeting BPT limitation standards. Instead, they enable EPA to determine an individual BPT limitation for an industry procuring a variance. As a result, an operator granted a variance is still in compliance with its BPT limitation standard. Its standard is just different from others.

It is apparent that if either argument just above stated is correct that EPA is not required to exclude toxic pollutants from BPT variances. We think that § 301(1) does not apply to BPT variances.

Toxic pollutants prior to the 1977 amendments were not treated differently from other pollutants in that BAT technology was not necessarily applied, and dischargers discharging toxic pollutants were nevertheless included in those required to comply with BPT effluent limitations. While the 1977 amendments have required BAT limitations for discharges of toxic substances, they do not indicate that they are to operate retroactively so as to possibly retract any variance previously issued to an industry which just happened to be discharging

toxic substances, or to obliterate the known practice of EPA in not excluding toxic substances from those pollutants for which a variance might be granted under BPT effluent limitations. Neither does the legislative history justify such a construction. See 3 U.S. Code Congressional and Administrative News, 1977, p. 4326 et seq. The interpretation of the statute by EPA is entitled to some deference. *E. I. duPont de Nemours v. Train*, 430 U.S. 112, 135 n. 25 (1977). It is also true that retroactive application of a statute is not favored. *Union Pacific RR Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913). In our case, § 301(1) speaks to preventing the *modification* of any requirement of § 301 as it applies to any specific pollutant on the toxic pollutant list. On its face, it might thus be said to apply to such parts of the statute as § 301(c) which speaks of *modifying* requirements for BAT limitations. Indeed, in § 301(g), 33 USC § 1311(g), also a part of the 1977 amendments, it is provided that the Administrator, with the concurrence of the State, shall *modify* BAT requirements with exceptions including toxic pollutants. While this may well be an indication of Congressional intent that the statute should be read as EPA reads it, that § 301(1) applies only to those sections of § 301 which in terms permit *modification*, in all events the best that can be said for § 301(1) is that it is not clear. That being true, we give weight to the construction the administering agency has placed upon the statute, and, when we consider that retroactivity is not favored, we are of opinion that § 301(1) does not apply so as to require the exclusion of toxic substances from BPT variance provisions.

Our ruling today is limited to the holding that BPT variance regulations need not exempt toxic pollutants. We do not consider whether or not, or how, EPA will construe § 301(c) with relation to § 301(1). That question is not before us and its consideration would be premature.

Accordingly, being of opinion that EPA's amendments to 40 CFR §§ 423.12(a), 423.22(a), 423.32(a), and 423.42 are sufficient to permit a compliance by the agency with our opinion and mandate, the petition of the industry to require further consideration of this matter by EPA is denied. (This petition was filed in case No. 74-2096.) The petition of the industry dealing with the same subject in case No. 78-1701 is likewise denied for the same reasons.

The petitions of NRDC are also denied for the reasons stated in this opinion. (These petitions were filed in cases Nos. 78-1878 and 78-1902.)